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7 IN THE DISTRICT COURT OF GUAM  
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9 DOMINICK L. FELDER.

10 Petitioner,

11 vs.

12 JOSE SAN AGUSTIN, Director Department  
13 of Corrections Guam,

14 Respondent.  
15

CIVIL CASE NO. 14-00014

**ORDER**

Dismissing Petition for Writ  
of Habeas Corpus

16 Petitioner, Dominick L. Felder, an inmate of the Territory of Guam by virtue of his judgment  
17 of conviction entered by the Superior Court of Guam, filed a Petition for Writ of Habeas Corpus (the  
18 “Petition”) pursuant to 28 U.S.C. § 2254. Petitioner is serving a 20-year sentence at the Guam  
19 Department of Corrections for his conviction for Second Degree Criminal Sexual Conduct. The  
20 Petition asserts said conviction should be reversed on various grounds, including due process and  
21 equal protection violations as well as ineffective assistance of counsel. After careful review of the  
22 Petition, the court hereby dismisses the Petition for the reasons set forth below.

23 **BACKGROUND**

24 The Petitioner was indicted for first degree criminal sexual conduct (“CSC”). Before the jury  
25 was instructed, the trial court went over the jury instructions with the parties. *People of Guam v.*  
26 *Felder*, 2012 Guam 8 at ¶5. The trial court inquired from the Petitioner’s trial counsel what his  
27 position was on the inclusion of an instruction for second degree CSC as a lesser included offense  
28 of first degree CSC. *Id.* In response to said inquiry, defense counsel stated, “The Supreme Court

1 [of Guam] has said in four or five cases [that] it is a lesser included offense.”<sup>1</sup> *Id.* The trial court  
2 thereafter included in its instructions to the jury that second degree CSC was a lesser included  
3 offense of the first degree CSC charged in the indictment.<sup>2</sup> *Id.* The jury eventually acquitted  
4 Petitioner of the first degree CSC offense but convicted him on second degree CSC. *Id.* at ¶6. The  
5 Petitioner was thereafter sentenced to 20 years incarceration. *Id.*

6 The Petitioner then appealed to the Supreme Court of Guam, raising two issues on appeal.  
7 *Id.* Pertinent to the discussion herein was Petitioner’s claim that the trial court’s giving of the lesser  
8 included offense instruction on second degree CSC amounted to reversible error. *Id.* at ¶10. The  
9 Supreme Court of Guam declined to apply the reversible error standard of review as urged by the  
10 Petitioner. *Id.* at ¶18. Instead, the Supreme Court of Guam reviewed the “unobjected-to lesser  
11 included offense instruction for plain error.”<sup>3</sup> *Id.*

12 Applying said standard, the Supreme Court of Guam found “[b]ecause second degree CSC  
13 is not a lesser included offense of first degree CSC it is error to instruct the jury on second degree  
14 CSC if such charge is not included in the indictment.” *Id.* at ¶20. Additionally, the court found the  
15 second prong of the plain error test to have been satisfied, since the error was clear or obvious under  
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18 <sup>1</sup> The Supreme Court of Guam characterized defense counsel’s response to the court’s  
19 inquiry as Petitioner “not object[ing] to the giving of an instruction on second degree CSC as a lesser  
20 included offense of first degree CSC.” *Id.* The Petitioner objects to such characterization, and  
21 asserts in Ground Two of his Petition that the Supreme Court of Guam erred in claiming that he  
22 acquiesced to the lesser included charge. Petition at 8, ECF No. 1. The Petitioner maintains that he  
“did not acquiesce to this charge nor did [he] request at any time to include this charge for [his]  
benefit as it [did] not benefit [him] to be indicted with multiple crimes [he] did not commit nor was  
[he] indicted for.” *Id.*

23 <sup>2</sup> “At the time of trial, it was settled that second degree CSC was a lesser included offense  
24 of first degree CSC; by the time of appellate consideration, the law changed[.]” *Id.* at ¶21. In two  
25 opinions filed in December 2010, the Supreme Court of Guam ruled that second degree CSC is not  
a lesser included offense of first degree CSC. *See People of Guam v. Cummins*, 2010 Guam 19, and  
*People of Guam v. Songeni*, 2010 Guam 20.

26 <sup>3</sup> Under the plain error standard of review, the Supreme Court of Guam stated it would “not  
27 reverse unless (1) there was error; (2) the error is clear or obvious under current law; (3) the error  
28 affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to  
maintain the integrity of the judicial process.” *Id.* at ¶19.

1 current law. *Id.* at ¶21. The Supreme Court of Guam found that the Petitioner failed to demonstrate  
2 the error violated his substantial rights<sup>4</sup> and further stated that even if his “substantial rights were  
3 affected, reversal is not necessary to prevent a miscarriage of justice or to maintain the integrity of  
4 the judicial system. *Id.* at ¶34. Accordingly, the Supreme Court of Guam affirmed the judgment of  
5 the trial court.

6 The Petitioner thereafter filed the instant Petition.

### 7 DISCUSSION

8 A petitioner who is in state custody and wishes the district court to grant a petition for writ  
9 of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion  
10 doctrine is based on comity to the state court and gives the state court the first opportunity to  
11 consider the claim and correct the state’s alleged constitutional error. *See O’Sullivan v. Boerckel*,  
12 526 U.S. 838, 844 (1999) (“Comity thus dictates that when a prisoner alleges that his continued  
13 confinement for a state court conviction violates federal law, the state courts should have the first  
14 opportunity to review this claim and provide any necessary relief.”) and *Peterson v. Lampert*, 319  
15 F.3d 1153, 1155-56 (9th Cir. 2003) (“A federal court may not grant habeas relief to a state prisoner  
16 unless he has properly exhausted his remedies in state court. . . . A petitioner must exhaust his state  
17 remedies by reaching the point where he has no state remedies available to him at the time he files  
18 his federal habeas petition.”). A petitioner can satisfy the exhaustion requirement by providing the  
19 highest state court with a full and fair opportunity to consider each claim before presenting it to the  
20 federal court. *Picard v. Connor*, 404 U.S. 270 (1971); *John v. Zenon*, 88 F.3d 828, 829 (9th Cir.  
21 1996).

22 In the instant case, the Petitioner raises the following five arguments to support his claim that  
23 he is being held in violation of the Constitution or laws of the United States: (1) ineffective  
24 assistance of counsel; (2) error by the Supreme Court of Guam in finding that the Petitioner  
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26 <sup>4</sup> In support of its finding that there was no violation of the Petitioner’s substantial rights,  
27 the Supreme Court of Guam stated that “the Fifth Amendment right to a grand jury indictment . . .  
28 has not been extended to Guam[.]” *Id.* at ¶24. Instead, “Guam provides a statutory, not a  
constitutional right to a grand jury indictment.” *Id.*

1 acquiesced to the giving of the lesser included charge; (3) “defective indictment violation of due  
2 process;” (4) trial court abused its authority by amending the indictment to include the lesser  
3 included charge; and (5) violation of the due process clause of the Fourteenth Amendment. The  
4 court finds that the instant Petition contains both exhausted and unexhausted claims. The Petitioner  
5 has exhausted his state judicial remedies as to grounds three and four, but not as to the remaining  
6 grounds asserted in the Petition.<sup>5</sup>

7 A federal court presented with a mixed habeas corpus petition must dismiss the entire petition  
8 without prejudice. *Rose v. Lundy*, 455 U.S. 509 (1982) holding that a federal court must dismiss a  
9 state prison’s habeas corpus petition that contains both exhausted and unexhausted claims).<sup>6</sup>

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11 <sup>5</sup> On its face, the Petition acknowledges that the Petitioner did not exhaust his state remedies  
12 on any of the grounds he raises. The Petitioner states that his defense counsel told him he had no  
13 other appeals left. See Petition at 5, ECF No. 1. He further states “having no other legal  
14 representation, no access to legal research material, and being denied upon request to the District  
15 Court of Guam legal representation to assist me with this matter, I currently have no other feasible  
16 remedy available to me but this writ.” *Id.*

16 <sup>6</sup> The Supreme Court discussed the exhaustion doctrine as follows:

17 The exhaustion doctrine is principally designed to protect the state courts’ role in the  
18 enforcement of federal law and prevent disruption of state judicial proceedings.  
19 Under our federal system, the federal and state “courts [are] equally bound to guard  
20 and protect rights secured by the Constitution.” Because “it would be unseemly in  
21 our dual system of government for a federal district court to upset a state court  
22 conviction without an opportunity to the state courts to correct a constitutional  
23 violation,” federal courts apply the doctrine of comity, which “teaches that one court  
24 should defer action on causes properly within its jurisdiction until the courts of  
25 another sovereignty with concurrent powers, and already cognizant of the litigation,  
26 have had an opportunity to pass upon the matter.”

27 A rigorously enforced total exhaustion rule will encourage state prisoners to seek full  
28 relief first from the state courts, thus giving those courts the first opportunity to  
review all claims of constitutional error. As the number of prisoners who exhaust all  
of their federal claims increases, state courts may become increasingly familiar with  
and hospitable toward federal constitutional issues. Equally as important, federal  
claims that have been fully exhausted in state courts will more often be accompanied  
by a complete factual record to aid the federal courts in their review.

*Rose*, 455 U.S. 518-19 (internal citations omitted).

## CONCLUSION

The seal of the United States District Court of Guam is a circular emblem. It features an eagle with wings spread, perched on a shield with vertical stripes. Above the eagle's head is a constellation of stars. The words "UNITED STATES OF AMERICA" are inscribed in a blue arc at the top, and "DISTRICT COURT OF GUAM" is inscribed in a blue arc at the bottom. Two small stars separate the top and bottom text on the left and right sides.

**/s/ Frances M. Tydingco-Gatewood**  
**Chief Judge**  
**Dated: Aug 03, 2015**